

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

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LDT
4-26-04

In re Application of: Mark C. Terranova,
Michael P. Shea, Robert E. Walsh,
Michael V. Iarrobino, Michael J. Stokes

§ Group Art Unit: 2155
§
§ Examiner: Benjamin R Bruckart
§
§ Atty. Dkt. No.: 5181-60700
§ P3917

Serial No. 09/633,476

Filed: August 7, 2000

For: System and Method for Testing
Server Latencies Using Multiple
Concurrent Users in a Computer
System

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37 C.F.R. § 1.8**

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APPEAL BRIEF

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Sir/Madam:

Further to the Notice of Appeal filed February 13, 2004, Appellant presents this
Appeal Brief. Appellant respectfully requests that this appeal be considered by the Board
of Patent Appeals and Interferences.

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I. REAL PARTY IN INTEREST

The subject application is owned by Sun Microsystems, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its principal place of business at 4150 Network Circle, Santa Clara, CA 95054, as evidenced by the assignment recorded at Reel 011023, Frame 0436.

II. RELATED APPEALS AND INTERFERENCES

This appeal is not related to any other appeals.

III. STATUS OF CLAIMS

Claims 1 – 24 were present in the original application. Claims 1 – 24 were pending. Claims 1, 2, 4, 7, 8, 10, 14, 15, 16, 18, 21 and 24 stand rejected under 35 U.S.C. § 102(b) over USPN 6,154,744 (Kenner et al., hereinafter “Kenner”). Claims 3, 9, 11, 12, 13, 17, 22, and 23 stand rejected under 35 U.S.C. § 103(a) over Kenner in view of USPN 6,650,648 (Dunn et al., hereinafter “Dunn”). Claims 5 and 19 stand rejected under 35 U.S.C. § 103(a) over Kenner in view of USPN 5,485,606 (Midgdey et al., hereinafter “Midgdey”). Claims 6 and 20 stand rejected under 35 U.S.C. § 103(a) over Kenner in view of Midgdey in further view of USPN 6,138,112 (Slutz). A copy of claims 1 – 24, as on appeal (incorporating all amendments), is included in the Appendix hereto.

IV. STATUS OF AMENDMENTS

No amendments to the claims have been filed subsequent to the final rejection.

V. SUMMARY OF THE INVENTION

Appellant’s claimed invention relates to a system and method for testing server latencies using multiple concurrent users in a computer system. A computer system may include a server and one or more clients. Multiple users may be created in the system

such that each user may login to the server. The server may include a directory for each user and the directory for each user may be populated with a mix of files according to a user type for each user. An instance of a test program may be executed for each user on one or more clients concurrently. The server may authenticate each user using the same or different operating system protocols. Each instance of the test program may be configured to cause a series of accesses to one or more files in the directory of its respective user on the server and may be configured to cause a latency value to be measured and stored for each access that is performed. *See* specification, page 2, lines 7 – 16.

VI. ISSUES

- I. Whether claims 1, 2, 4, 7, 8, 10, 14, 15, 16, 18, 21 and 24 under 35 U.S.C. § 102(b) are unpatentable over Kenner.
- II. Whether claim 5 under 35 U.S.C. § 103(a) is unpatentable over Kenner in view of Midgdey.

VII. GROUPING OF CLAIMS

For the purposes of this appeal only:

Claims 1 – 3, 7 – 9, 11 – 17, and 22 – 24 stand or fall together.

Claims 4 and 18 stand or fall together.

Claims 5, 6, 19 and 20 stand or fall together.

Claims 10 and 21 stand or fall together.

The reasons why each group of claims is believed to be separately patentable are explained below in the Argument.

VIII. ARGUMENT

A. Claims 1 – 3, 7 – 9, 11 – 17, and 22 – 24

Claim 1 stands rejected under 35 U.S.C. § 102(b) as unpatentable over Kenner (USPN 6,154,744). Appellant asserts that the Examiner has not established a *prima facie* case that Kenner teaches the system described in Appellant's claim 1.

In the Office Action dated November 17, 2003, the Examiner asserts that Kenner teaches:

A server (col. 5, lines 44 – 50); a first client coupled to said server (col. 5, lines 44 – 50); wherein said server is configured to login a first user and a second user (col. 9, lines 40 – 45), wherein said first client is configured to execute a first instance of a test program by said first user and a second instance of said test program by said second user substantially concurrently (col. 7, lines 3 – 6), wherein said first instance of said test program is configured to cause a second access to a second file on said server (col. 5, line 23), wherein said first client is configured to store a first latency value associated with said first access, wherein said first client is configured to store a second latency value associated with said second access (col. 11, lines 15 – 23).

However, Appellant can find no language in the cited passages of Kenner that teaches or suggests a system “**wherein said first client is configured to execute a first instance of a test program by said first user and a second instance of said test program by said second user substantially concurrently,**” as recited in Appellant's claim 1.

Kenner teaches: “A first user terminal 12 is also depicted in Fig. 1. The first user terminal 12 is connected to an Internet service provider (ISP) 14, which is typically just a computer, router, or terminal server connected to the Internet 10. An ISP 14 can host additional user terminals, such as a second user terminal 16. Other ISPs, such as a second ISP 18, are also connected to the Internet 10. A third user terminal 20 is shown connected to the second ISP 18. Only three user terminals are shown; however, it should be recognized that the number of concurrent users of the invention is unlimited, subject to the operational details set forth below.” (Col 6, line 63 – col. 7, line 6)

Appellant respectfully disagrees with the Examiner's contention in the Advisory Action of February 27, 2004 that Kenner does teach more than one user on a computer since "the number of concurrent users is unlimited". The Examiner further states that no reference in Kenner can be found that teaches only one user per terminal. Appellant respectfully reminds the Examiner that for a rejection under section 102, the identical invention must be shown in as complete detail as is contained in the claims, and that the burden of proof is on the Examiner to show "**said first client is configured to execute a first instance of a test program by said first user and a second instance of said test program by said second user substantially concurrently,**" as recited in Appellant's claim 1. Applicant further notes that even if, *arguendo*, Kenner were to teach more than one user per terminal, such teaching would not require a first instance and a second instance of a test program.

The Examiner further asserts in the Office Action dated November 17, 2003 that "a second user is logged in concurrently through the same configuration utility." Kenner teaches that "this management function is facilitated by the use of a configuration utility 34 and a client program 36 run within a storage medium (i.e. random access memory) on the user terminal 12." (Fig. 1 and col. 7, line 65 – col. 8 line 2) However, Appellant's claim 1 recites "wherein **said server** is configured to login a first user and a second user." Appellant respectfully disagrees with the Examiner's characterization of Kenner's configuration utility 34 as a server. Furthermore, Appellant can find no language in Kenner that teaches or suggests that said configuration utility 34 is operable to log in a plurality of users **concurrently**.

For these reasons, Appellant respectfully submits that claim 1, along with dependent claims 2 – 3, 7 – 9, 11 – 14, patentably distinguishes over Kenner.

Claim 15 recites features similar to those of claim 1 as discussed above and is thus also believed to distinguish over the cited reference for at least the same reasons, along dependent claims 16 – 17, and 22 – 24.

B. Claims 4 and 18

All the arguments given above in regard to claim 1 apply to claim 4. Furthermore, claim 4 recites:

The system of claim 1, **wherein said first user corresponds to a first user type, and wherein said second user corresponds to a second user type.** (Emphasis added)

Kenner teaches “Moreover, although the illustrative embodiments are described primarily for use in a video delivery system, it should be recognized that a system according to the invention can be used to distribute various other kinds of computer data (e.g. application programs, database files and other business information, virtual reality files, multimedia such as Macromedia Shockwave files, and large text files such as books) as well. *Such other types of data can be managed by the invention in different content provider groups as discussed in detail above*; a different type of program (rather than the player program 36) typically would be invoked at the user terminal 12 to view or use other types of data.” (Col. 16, line 60 – col. 17, line 5) (Emphasis added.)

Appellant can find no language in Kenner that teaches or suggests “**wherein said first user corresponds to a first user type, and wherein said second user corresponds to a second user type,**” as recited in Appellant’s claim 4. In comparison, Kenner teaches types of data managed by different content provider groups.

Accordingly, Kenner does not teach or suggest the features identified above with respect to claim 4. Claim 18 recites similar features to claim 4 and is thus also believed patentable.

C. Claims 5, 6, 19 and 20

All the arguments given above in regard to claim 1 apply to claim 5. Furthermore, claim 6 recites:

The system of claim 4, wherein server is configured to create a first directory for said first user, **wherein said server is configured to populate said first directory with a first plurality of files according to said first user type**, wherein said first plurality of files includes said first file, wherein server is configured to create a second directory for said second user, **wherein said server is configured to populate said second directory with a second plurality of files according to said second user type**, and wherein said second plurality of files includes said second file. (Emphasis added)

Midgley teaches that “the program locks open (116) the temporary store in order to create a directory file 28a and add (118) the directory file to the developing directory tree in the temporary store,” (col. 7, lines 30 – 34) and that “From block 216, the program determines at 234 that additional files remain to be copied and creates (236) a user file on the hard disk from the information added at 218 to the directory tree for that file. The function then seeks (238) the file header 50 for the corresponding data file 32a from the offset information in field 42 of the corresponding directory file 28a. The data 54 is copied at 240 from medium 10 to the disk by offsetting from the beginning of the header according to the header length information in field 53. The corresponding data file is closed at 242 and the function returns to 234 to determine if additional data files remain to be copied.” (Col. 9, line 63 – col. 10, line 7)

Appellant can find no teaching or suggestion in either Kenner or Midgley, taken both separately and in combination, of a system containing a first user type and a second user type. Furthermore, Appellant can find no language in Kenner or Midgley that teaches or suggests “**wherein said server is configured to populate said first directory with a first plurality of files according to said first user type**,” and “**wherein said**

server is configured to populate said second directory with a second plurality of files according to said second user type,” as recited in Appellant’s claim 5. In contrast, Midgley teaches the copying of files onto a hard disk.

Accordingly, claim 5, along with its dependent claim 6, is believed to patentably distinguish over the cited art for at least the reasons given above. Claim 19 recites similar features to claim 5 and is thus also believed to distinguish over the cited references for at least the same reasons, along with its dependent claim 20.

D. Claims 10 and 21

All the arguments given above in regard to claim 1 apply to claim 10. Furthermore, claim 10 recites:

The system of claim 1, wherein said server is configured to login said first user using a first operating system protocol, and wherein said server is configured to login said second user using a second operating system protocol. (Emphasis added)

Kenner teaches: “Although the configuration utility 34 and the client program 36 are shown in FIG. 1 as a part of only the first user terminal 12, it should be recognized that any user terminal, such as terminals 16 and 20, participating in the system will use such software. A user desiring to participate in the system can obtain the software comprising the configuration utility 34 and client program 36 directly from the MSP 32, or through traditional retail or other channels (such as being part of the browser or operating system of the computer).” (col. 8, lines 1 – 10)

The Examiner further asserts in the Advisory Action of February 27, 2004 that “The Kenner reference teaches the configuration utility and client program can be integrated in a browser or an operating system. The Kenner reference teaches the use of many different protocols, IP protocol (col. 17, lines 50 – 54), ICMP protocol (col. 4, lines 50 – 60), SNMP protocol (col. 10, lines 55 – col. 11, line 4) and Web protocol (col. 1, lines 42 – 52).”

Kenner teaches that the configuration utility may be integrated into an operating system. However, Appellant's claim 10 recites "wherein **said server** is configured to login said first user using a first operating system protocol, and wherein said server is configured to login said second user using a second operating system protocol." Appellant again respectfully disagrees with the Examiner's characterization of Kenner's configuration utility 34 as a server.

In addition, Appellant can find no language in Kenner which teaches or suggests "said server is configured to **login said first user using a first operating system protocol, and** wherein said server is configured to **login said second user using a second operating system protocol.**"

Finally, Appellant notes that neither IP, ICMP, SNMP nor Web protocol is an "**operating system protocol,**" as recited in Appellant's claim 10.

Accordingly, claim 10 is believed to patentably distinguish over the cited art for at least the reasons given above. Claim 21 recites similar features to claim 10 and is thus also believed to distinguish over the cited art for at least the same reasons.

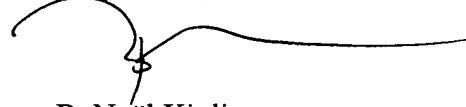
IX. CONCLUSION

For the foregoing reasons, it is submitted that the Examiner's rejection of claims 1 – 24 was erroneous, and reversal of the Examiner's decision is respectfully requested.

This Appeal Brief is submitted in triplicate along with the following items:

- ☒ Return Receipt Postcard
- ☒ Deposit Account Fee Authorization form for the \$320.00 appeal brief fee.

Respectfully submitted,



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X. APPENDIX A

The claims on appeal are as follows.

Claim 1 (previously presented): A system comprising:

a server;

a first client coupled to said server;

wherein said server is configured to login a first user and a second user, wherein said first client is configured to execute a first instance of a test program by said first user and a second instance of said test program by said second user substantially concurrently, wherein said first instance of said test program is configured to cause a first access to a first file on said server, wherein said second instance of said test program is configured to cause a second access to a second file on said server, wherein said first client is configured to store a first latency value associated with said first access, and wherein said first client is configured to store a second latency value associated with said second access.

Claim 2 (original): The system of claim 1, wherein said server is configured to verify that said first user has permission to access said first file in response to said first access.

Claim 3 (original): The system of claim 2, wherein said first latency value represents a first time portion corresponding to said first access and a second time portion corresponding to said server verifying said first user has permission to access said first file.

Claim 4 (original): The system of claim 1, wherein said first user corresponds to a first user type, and wherein said second user corresponds to a second user type.

Claim 5 (original): The system of claim 4, wherein server is configured to create a first directory for said first user, wherein said server is configured to populate said first directory with a first plurality of files according to said first user type, wherein said first

plurality of files includes said first file, wherein server is configured to create a second directory for said second user, wherein said server is configured to populate said second directory with a second plurality of files according to said second user type, and wherein said second plurality of files includes said second file.

Claim 6 (original): The system of claim 5, wherein said first instance of said test program is configured to identify each of said first plurality of files in said first directory, wherein said first instance of said test program is configured to create a first order of said first plurality of files using a first seed value, wherein said second instance of said test program is configured to identify each of said second plurality of files in said second directory, and wherein said second instance of said test program is configured to create a second order of said second plurality of files using a second seed value.

Claim 7 (original): The system of claim 1, further comprising:
a second client coupled to said server;
wherein said server is configured to login a third user, wherein said second client is configured to execute a third instance of said test program by said third user substantially concurrently with initiating said first instance and said second instance, wherein said third instance of said test program is configured to cause a third access to a third file on said server, and wherein said second client is configured to store a third latency value associated with said third access.

Claim 8 (original): The system of claim 7, wherein said server is configured to verify that said third user has permission to access said third file.

Claim 9 (original): The system of claim 8, wherein said third latency value represents a first time portion corresponding to said third access and a second time portion corresponding to said server verifying said third user has permission to access said third file.

Claim 10 (original): The system of claim 1, wherein said server is configured to login said first user using a first operating system protocol, and wherein said server is configured to login said second user using a second operating system protocol.

Claim 11 (original): The system of claim 1, wherein said server is configured to convey a first token to said first client in response to logging in said first user, and wherein said server is configured to convey a second token to said first client in response to logging in said second user.

Claim 12 (original): The system of claim 11, wherein said server is configured to verify that said first user has permission to access said first file in response to said first access using said first token, and wherein said server is configured to verify that said second user has permission to access said second file in response to said second access using said second token.

Claim 13 (original): The system of claim 1, wherein said first instance of said test program is configured to cause a third access to a third file on said server, wherein said second instance of said test program is configured to cause a fourth access to a fourth file on said server, wherein said first client is configured to store a third latency value associated with said third access, and wherein said second client is configured to store a fourth latency value associated with said fourth access.

Claim 14 (original): The system of claim 1, wherein said first access comprises a first read access or a first write access, and wherein said second access comprises a second read access or a second write access.

Claim 15 (original): A method comprising:
 logging in a first user to a server;
 logging in a second user to said server;
 executing a first instance of a test program by said first user including:

performing a first access to a first file on said server; and
storing a first latency value associated with said first access; and

executing a second instance of said test program by said second user substantially
concurrently with said executing said first instance of said test program
including:

performing a second access to a second file on said server; and
storing a second latency value associated with said second access.

Claim 16 (original): The method of claim 15, further comprising:

verifying that said first user has permission to access said first file in response to
said first access.

Claim 17 (original): The method of claim 16, wherein said first latency value represents
a first time portion corresponding to said first access and a second time portion
corresponding to said verifying.

Claim 18 (original): The method of claim 15, wherein said first user corresponds to a
first user type, and wherein said second user corresponds to a second user type.

Claim 19 (original): The method of claim 18, further comprising:

creating a first directory for said first user;
populating said first directory with a first plurality of files according to said first
user type, wherein said first plurality of files includes said first file;
creating a second directory for said second user; and
populating said second directory with a second plurality of files according to said
second user type, wherein said second plurality of files includes said
second file.

Claim 20 (original): The method of claim 19, further comprising:

wherein said executing said first instance further comprises:

identifying each of said first plurality of files in said first directory; and
creating a first order of said first plurality of files using a first seed value;

and

wherein said executing said second instance further comprises:

identifying each of said second plurality of files in said second directory;

and

creating a second order of said second plurality of files using a second seed value.

Claim 21 (original): The method of claim 15, further comprising:

wherein said logging in said first user further comprises:

logging in said first user using a first operating system protocol; and

wherein said logging in said second user further comprises:

logging in said second user using a second operating system protocol.

Claim 22 (original): The method of claim 15, further comprising:

generating a first token in response to said logging in said first user; and

generating a second token in response to said logging in said second user.

Claim 23 (original): The method of claim 22, further comprising:

verifying that said first user has permission to access said first file in response to said first access using said first token; and

verifying that said second user has permission to access said second file in response to said second access using said second token.

Claim 24 (original): The method of claim 15, wherein said first access comprises a first read access or a first write access, and wherein said second access comprises a second read access or a second write access.